



## Kentucky Law Journal

Volume 2 | Issue 3

Article 2

1913

# What is the Rule of Consideration in Kentucky?

Jesse I. Miller

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Contracts Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

### Recommended Citation

Miller, Jesse I. (1913) "What is the Rule of Consideration in Kentucky?," *Kentucky Law Journal*: Vol. 2 : Iss. 3 , Article 2.  
Available at: <https://uknowledge.uky.edu/klj/vol2/iss3/2>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# Kentucky Law Journal

VOL. II.

LEXINGTON, KY., DECEMBER, 1913

No. 3

## WHAT IS THE RULE OF CONSIDERATION IN KENTUCKY?



IN a recent issue of the KENTUCKY LAW JOURNAL (Vol. 1, No. 2, p. 1) Judge Lyman Chalkley, under the caption "Parole Written Contracts in Kentucky," construing section 471 of the Kentucky Statutes, made the point that whereas the statute under consideration placed all unsealed writings upon an equal, and the same footing with sealed instruments all the characteristics of the specialty were by the statute conferred upon the simple written contract. The formal contract requires no consideration. Therefore, it was argued, a parole written contract in this state does not require a consideration to sustain it.

The objection immediately raised to this conclusion was and has continued to be that Section 472, Kentucky Statutes, gives the obligor the right to impeach or deny the consideration of any written instrument. *A fortiori*, the consideration of the formal contract may be impeached or denied. Therefore, while prior to the enactment of Section 472, the seal upon a written instrument raised a conclusive presumption of a consideration, by the statute such presumption was made rebuttable. Hence, reading sections 471 and 472 together, it is argued that the law as to consideration in a written instrument is that both sealed and unsealed writings import a rebuttable presumption of consideration.

The sections of the Kentucky Statutes in question are as follows:

Section 471. A seal or scroll shall in no case be necessary to give effect to a deed or other writing. All unsealed writing shall stand upon the same footing with sealed writing, having the same force and effect and upon which the same actions may be founded. But this section shall not apply to, nor shall it alter, any law requiring the State or county seal, or the seal of a court, corporation or notary to any writing.

Section 472. The consideration of any writing, with or without seal may be impeached or denied by pleading verified by oath.

The fallacy of the argument against the theory advanced by Judge Chalkley lies in the fact that his opponents arrive at their conclusions upon an unsound major premise. It is assumed by them that the formal instrument raises a presumption of consideration, conclusive where unmodified by legislative enactment. ¶It is submitted that such an assumption is contradicted by the history of the English law and is unwarranted in the light of judicial precedent.

The seal upon a written instrument at common law did not import consideration. As a matter of history, the idea of consideration, as an element necessary to sustain the contractual relation, is a comparatively recent one and peculiar to our own system of jurisprudence.

In the English system, as well as in all others, form, during the early periods of development, is the essential element in contract. The idea of the necessity of a consideration before an agreement could be sustained, if under seal, is a very recent innovation in the law of contract.

The law is stated most clearly by Anson as follows (Law of Contract' pp.60-61) :

Alike in English and Roman law, form, during the infancy of the system, is the most important ingredient in contract. The courts look to the formalities of the transaction as supplying the most obvious and conclusive evidence of the intention of the parties; the notion of consideration, if not unknown, is at any rate imperfectly developed. \* \* \* The English law starts with two distinct conceptions of contract. One that a promise is binding if expressed in form of a certain kind; the other, that the acceptance of benefits of a certain kind imports a liability to repay them. \* \* \* But under many varieties of procedure, we detect two leading ideas, the binding character of an undertaking clad in solemn form, and the readjustment of propriety right where money or goods had been lent for consumption or use. In English law, we find that before the end of the thirteenth century there were two liabilities analogous in character to those I have just described; one formal, the promise under seal, which was looked on as something in the nature of a present grant; one informal, from sale or delivery of goods, or loan of money, in which consideration has passed on one side, and the liability was expressed in the action of debt. Beyond this, the idea of enforcing an informal promise, simply because a benefit was accruing or was about to accrue to the promisor by an act or forbearance of the promisee, does not appear to have been entertained before the middle or end of the fifteenth century.

The formal contract of the English law is the contract under seal. Only by the use of this form could the promise, as

such be made binding, until the doctrine of consideration began to prevail. We have to bear in mind that it is to the form only that the courts look in upholding this contract; the consensus of the parties has not emerged from the ceremonies which surround its expression. Courts of law will not trouble themselves with the intention of the parties who have not couched their agreement in solemn form to which the law attaches legal consequences. Nor on the other hand, where the form is present, will they demand or admit further evidence as to intention.

It is probably due to the influence of the courts of chancery that, later on, the common law courts begin to take account of the intention of the parties. The idea of the importance of form henceforth undergoes a curious change. When a contract comes before the courts, evidence is required that it expresses the genuine intention of the parties and their evidence is found either in the solemnities of the contract under seal, or in the presence of consideration, that is to say, in some benefit to the promisor or loss to the promisee, granted or incurred by the latter in return for the promise of the former. Gradually consideration came to be regarded as the important ingredient in contract and then the solemnity of the deed is said to make a contract binding because it imports "a consideration," *though in truth there is no question of consideration; it is the form which brings about legal consequences.*

And continuing further, after discussing the manner in which the action of assumpsit impressed the idea of consideration upon the law of contract, he says (p. 64):

So silent was the development of the doctrine as to the universal need of consideration for contracts not under seal, and so marked was the absence of any express authority for the rule in its broad and simple application, that Lord Mansfield, in 1765, raised the question whether, in the case of commercial contracts, made in writing, there was any necessity for consideration to support the promise. In the case of *Pillans v. Van Mierop* (3 Burr., 1553), he held that the consideration was only required as evidence of intention, and that where such evidence was effectually supplied in any other way, the want of consideration would not affect the validity of a parole promise. This doctrine was emphatically disclaimed in the opinion of the judges delivered not long afterwards in the House of Lords in *Rann vs. Hughes* (7 T. R., 350). The logical completeness of our law of contract as it stands at present is apt to make us think that its rules are inevitable and must have existed from all time. To such an impression the views set forth by Lord Mansfield in 1765 are a useful corrective.

And Smith, in his lectures on the Law of Contracts (p.19) states the law thus:

"In the first place, a contract by deed requires no consideration to support it; or perhaps it might be more correct to say that, as a general proposition, the law conclusively presumes that it is made upon a good and sufficient consideration."

And in the note thereto:

"The proposition was properly qualified in the remainder of the sentence. At common law no consideration was requisite to the validity of a deed but since the introduction of conveyance taking effect by virtue of the Statute of Uses, courts of equity and then courts of law, have held a consideration necessary to support such an instrument. It need not be expressed in the deed but may be proved."

It is to be noted here that the exception thus mentioned is in reality no exception at all and does not affect the general rule that a specialty requires no consideration to render it binding. The consideration in deeds of bargain and sale, covenant to stand seized and lease and release is solely to raise a use in favor of the grantee and to thus transfer to him the legal interest in the estate to be conveyed by operation of the Statute of Uses. Consideration in a deed not operating by virtue of the Statute of Uses is nowhere found to be requisite. Deeds of feoffment, lease and the other common law conveyances required no consideration but each was supported by the formalities accompanying its execution. (Blk. Comm. Bk.2,p.310).

"It is often said that the seal imports a consideration or that it estops the covenantor to deny that there was a consideration, but the expression shows a misapprehension of the history of the seal. A sealed contract was enforceable at common law, as such, long before consideration was thought of as an element of contract." (Page on Contract. Vol. p. 875)

It must be admitted, however, that in spite of historical certainty that a seal did not import a consideration, the courts in many of the United States have joined in declaring that "a seal imports a conclusive presumption of consideration." (Cross v. State Bank, 5 Ark. 525; Rutherford v. Executive Com. 9 Ga. 54; Evans v. Edwards, 26 Ill. 279; Mansfield v. Watson, 2 Ia. 111; Northern Kans. Town Co. v. Oewald, 18 Kan. 336; Steele v. Mitchell, 2 Ky. 37; Wing v. Chase, 35 Me. 260; Bond v. Conway, 11 Md. 512; Hayes v. Kyle, 80 Mass. 300; Dye v. Mann, 10 Mich. 291; Rose v. Roberts, 9 Minn. 119; Brewer v. Bessinger, 25 Miss.

86; Hyman v. Kelley, 1 Nev. 179; Farmer v. Burnett, 21 N. J. Eq. 87; Angier v. Howard, 94, N. C. 27; Reddish v. Harrison, 1 Wright 221, Paddock v. Hume, 6 Ore. 82; Grubb v. Willis, 11 S. and R. (Pa.) 106; Matlock v. Gibson, 8 Rich. Law. 437; Wingo v. Peck, 54 Vt. 245 et al.)

But an examination of the cases in which the rule has been laid down that a seal imports consideration, discloses the fact that the question whether a seal imports consideration and therefore raises an enforceable obligation or whether such seal, by virtue of its presence alone, gives rise to the obligation, regardless of the existence of a consideration was never before the court for decision. In every case the court has assumed that the seal does import consideration and in every case *the rule enunciated has been dictum*. The bench has unconsciously drifted into the notion, growing out of the fact that the issue of "form or consideration" has never been squarely raised, that both the sealed and unsealed contract are based upon the existence of a consideration.

It is quite natural that this conception should have crept into the decisions. In the first place, the idea of consideration in unsealed instruments gaining a firm place in the law of contract, it was an easy matter for the courts to lapse into the error of applying the same rule as to consideration to both formal and unsealed writings, to the former attributing a conclusive, to the latter a rebuttable presumption of consideration.

Moreover, so long as the obligor under the speciality was estopped to deny his act or promise, it made no difference, so far as the rights of the parties were concerned, whether the courts looked upon the seal as raising a conclusive presumption of consideration or of rendering the speciality binding in the absence of consideration by reason of its form alone. It was only when the legislatures of the several states in the United States, in the last century, began to enact statutes, the general effect of which was to make the seal prima facie evidence of consideration, that the distinction above mentioned could have been of any importance. And the courts, irregardless of the wording of the statutes, which differ in the several states, have construed them all upon the assumption that the seal *per se* imports consideration.

*I have been unable to find a single case in which a court has directly decided that a seal imports consideration and that it is not, of itself the binding element of a speciality. The issue seems never to have been raised.*

I do not attempt to dispute the right of any legislature to de-

clare that the seal shall be evidence of consideration and that a formal instrument shall require a consideration to support it. It is my purpose to show in the following that the General Assembly of Kentucky has not done so and that Section 472 of the Kentucky Statutes *has not changed the law of contract as to consideration in sealed instruments but has extended it to all contracts in writing.*

It is a cardinal principle of construction that no statute shall be construed in derogation of a well-settled principle of common law, if any other construction be possible without doing violence to the intention of the legislature. ( Blk. Comm. Bk.1,p.90 ). It is true that this rule has, to a certain extent been modified by legislation ( Ky.Stat. 446; Gen. Stat. Ch.21,sec.16; Revised. Stat. Ch.21, sec.16 ) but the rule stated was the one in force for many years after the original enactment of Sec 472 ( Lee v. Forman, 3. Met. 114 ) and must govern the earlier and leading constructions of the statutes and the intention of the legislature at the time of its enactment.

It has always been a principle of equity that the consideration, if any, of an instrument, sealed or unsealed, can be impeached or denied in the presence of *fraud, mistake or duress*. The rule is admirably stated in Meek v. Frantz, 33 Atl. ( Pa ), in which the court says:

“If the defendant voluntarily executed the agreement on which the suit is based and there was no fraud practised in obtaining it, mere want of consideration will not constitute a defense. There is a well-settled distinction between cases in which a valuable consideration was intended to pass and therefore furnished the motive for entering into the contract and cases in which such consideration was not contemplated by the parties. In the former, failure of consideration is a defense, although the contract is under seal; while in the latter, equity will not relieve against an instrument under seal, merely on the ground of want of consideration.” ( Cf. also Rendleman v Rendleman, 41 N.E. ( Ill ). 223; Hardesty v Smith, 3 Ind. 39; Key v Knott, 9 G. and J. ( Md. ) 342; Aller v Aller, 40 N. J. L. 446; Bruce v Lee, 4 Johns ( N.Y. ) 410. )

In the light of the forgoing, let us now turn to Section 472 of the Kentucky Statutes ( ante ).

If the proposition be taken as true that, at common law, the specialty required no consideration to support it and that all writings in Kentucky are placed upon the footing of specialties (Sec. 471 ), we arrive at the conclusion that no written contract in this state, in the absence of express statutory enactment, demands a

consideration to support it. (Ante as to conveyances of land.) It is submitted that such a conclusion is perfectly justifiable in view of the facts above set out. To impeach or deny the consideration of a writing, therefore, in the absence of fraud, mistake or duress, is of no effect since the presence or absence of such, where there is no evidence of fraud, mistake or duress, is inconsequential *unless it has been expressly, enacted that a consideration shall be necessary to sustain a sealed writing.*

The only question for us to determine, therefore, is whether Section 472 has expressly, or even impliedly, made it requisite that a sealed writing be supported by a consideration before our courts will hold it to raise a binding obligation and enforce it

What then is the effect of the first phrases of section, "that the consideration of any writing, \* \* \* may be impeached or denied?" Obviously, the statute is only *declaratory of the equitable doctrine that the consideration of any writing, sealed or unsealed may be impeached or denied for fraud, mistake or duress.* There is absolutely nothing in the wording of the section which would, in any sense, justify a conclusion that the legislature intended to make the seal prima facie evidence of a consideration. *It has provided that the consideration may be impeached or denied but by no means has it gone so far as to declare that a consideration shall be necessary to support a contract under seal.* What the legislature has enacted is easily reconcilable with a perfectly well-established doctrine of the chancellor *and must therefore be held, not to change it, but to declare it in legislative form.*

If it be shown, and the statute authorizes that such showing be made, although the same was permissible in chancery from time immemorial, that the defendant entered into a covenant with the plaintiff, believing himself indebted or obligated to plaintiff and subsequently he discover that such indebtedness or obligation did not exist at a time at which he covenanted, then he may plead "no consideration" as of the time of entering into the covenant and his plea will be good upon demurrer. But the contract will not be rendered void because of the necessity of a consideration to sustain it but rather because there was no meeting of the minds at the time at which the covenant was entered into, the defendant binding himself through mistake to perform. The plea is directed at the failure of the parties to have agreed, i. e., defendant pleads mistake and is not an averment that a consideration, as a matter of law, is necessary to sustain the speciality. The mistake pleaded arises from the fact that the defendant believed an obli-



gation, that is a consideration, existed when, as a matter of fact, such was not the case. *The plea goes as to the element of agreement in the covenant, not as to an element of consideration*

What change then, if any, has the statute introduced? The answer is found in the final phrase thereof, "that the consideration \* \* \* may be impeached \* \* by pleading, verified by oath."

The original of Section 472, Kentucky Statutes, is an act of the General Assembly, approved December 18, 1801. (2 Litt. Laws of Ky., 442.) Sections 1 and 6 of that act are as follows:

Section 1.—Be it enacted that whensoever any suit shall be commenced in any of the courts of this Commonwealth having jurisdiction thereof, founded on any writing, whether the same be under seal or not, the court before whom the same is depending, shall receive such writing as *evidence* of that debt or duty for which it was given and it shall not be lawful for the defendant or defendants, in any such suits, to deny the execution of such writing, unless it be by plea, supported by the affidavit of the party putting in such plea, which affidavit shall accompany the plea and be filed therewith at the time such plea is filed, which affidavit may be made before an<sup>d</sup> justice, etc."

Section 6.—That whensoever any suit is depending in any court in this Commonwealth, founded on any writing, under the seal of the person to be charged therewith, it shall and may be lawful for the defendant or defendants therein, by a special plea, to impeach or go into the consideration of such bond *in the same manner* as if the said writing had not been sealed, any law to the contrary notwithstanding.

It is to be observed from a perusal of these sections of the Act of 1801 that there is not a single word or phrase indicating an intention on the part of the legislature to make the seal *prima facie* evidence of consideration or to declare a consideration necessary to sustain an obligation assumed under seal. It is provided (Sec. 1) that in a suit founded on any writing, sealed or unsealed, the writing shall be received as *evidence*, and that to deny its execution (presumable on the grounds of fraud, mistake or duress), defendant must do so by plea and support the same by affidavit. The plea must not merely be verified; a separate affidavit must be filed therewith. *The grounds upon which the instrument may be impeached are not set out at all and we cannot, therefore, surmise or assume that the legislature was setting up new grounds of defense, but that it was simply providing for the pleading of grounds already existent and in a special and definite manner, a new manner, i. e., by a pleading verified by oath.*

And after providing generally *a method* whereby instruments, sealed or unsealed, might be impeached, the legislature reenacted (Sec. 6) the same provisions with special regard to sealed instruments providing that their consideration might be impeached or denied in the *same manner* as unsealed instruments. This manner, let me repeat, is by pleading verified by oath.

It is plain, therefore, that if the legislature did actually accomplish any new result by the enactment it was this: that *it introduced a new rule of evidence whereby the consideration of all writings must, or at least might* (compare wording of Sec. 1 and 6) *be impeached or denied by affidavit.*

That it was the intention of the General Assembly, as gathered from the act itself, to enact a rule of evidence, is further shown by the provisions of the act of 1814, amending the act of 1801 (5 Litt. Laws, 265). Section 4 is as follows:

Be it further enacted that when any defendant or defendants, in any action founded on any specialty or note in writing shall by special plea impeach or go into the consideration of such instrument under the act entitled, etc., \_\_\_\_\_ approved \_\_\_\_\_, 1801, he shall support such plea by affidavit, stating therein that the facts therein contained are true as far as detailed as such, from his own knowledge; and that he believes them to be so, as far as detailed as such, from the information of others; provided, however, that nothing herein contained shall be construed to throw the burden of proof on the plaintiff or plaintiffs.

Here it is seen that the legislature provided more specifically as to the subject matter of the affidavit necessary or proper in impeaching or denying the consideration in the specialty.

Section 472, Kentucky Statutes, is the present form of these earlier enactments and is a verbatim enactment of a portion thereof. It cannot, therefore, be said to have any force and effect apart from that of those upon which it is based and of which it is an abridgement.

From these considerations the conclusions as to the effect of the present statute must be that it allows the defendant to impeach or deny the consideration of a writing, sealed or unsealed, for fraud, mistake or duress, by a pleading verified by oath and that such affidavit may be introduced as evidence to establish defendant's plea.

Let us now revert to an examination of the decisions of the Kentucky Court of Appeals relative to the effect of Section 472.

The leading case in point, construing the statute is *Ralston and Sebastian vs. Bullitts* (3 Bibb, 263), decided in 1814. On account of its important bearing upon subsequent decisions, it will not be amiss to discuss it somewhat fully. A bill of exchange was drawn by A. B. on December 9, 1806 at Frankfort on O. at New York, payable to L. ninety days after sight, indorsed by L. and B. and by B. to R. The bill was presented for payment January 26, 1807, and protested, but notice thereof was not given defendants until February 13, 1809, when a bond was executed by them for the payment of the bill. Suit was later brought on the bond to which defendants entered three pleas. Numbers one and three alleged that the bond was executed by defendants in consideration of their supposed liability as endorsers, when as a matter of fact they had been discharged by the failure of plaintiff to notify them of protest within a reasonable time. Number two denied that the bond was executed upon a good and valuable consideration.

In delivering the opinion of the Court, Boyle, C. J., said :

"If, therefore, the defendants were wholly discharged from any responsibility for the want of due notice of the non-acceptance of the bill, the bond given for the payment of the amount of the bill was without consideration. A promise to pay in such a case is not binding. (5 Burr., 2670.) Nor would the circumstances that the promise was reduced to writing make any difference; for a written, no more than a verbal promise, is binding, if made without consideration; and the act of 1801, (2 Bibb, 263) having authorized the defendant in an action on a bond or other writing under seal, by special plea, to impeach or go into the consideration in the same manner as if such writing had not been sealed, it evidently follows that the bond on which suit is brought is in this respect placed upon the same footing as a verbal or written promise and consequently not binding upon the defendants."

As to plea number two, purely a question of pleading was decided by the Court upon the objection of plaintiff that the plea, being in the negative, was not such a special plea as was authorized by the statute. Upon this point, the Court said:

"Although in the negative, yet it is a special plea; it does not, like the general issue, traverse the plaintiffs whole declaration, but advances new matter not stated in the declaration. Special pleas are usually in the affirmative, but they are sometimes in the negative."

It will thus be seen that the Court was not deciding in its discussion of plea number two whether a voluntary contract under seal, in the absence of fraud, mistake or duress was voidable, but merely whether a negative special plea was good upon demurrer.

In *Boone vs. Shackelford*, (7 Ky., 67,) (1815,) the Court held that a

“plea above mentioned (no consideration), was held good upon much consideration by this Court in the case of *Ralston and Sebastian vs. Bullitts*.”

But the case cited by the Court did not settle the point whether or not a covenant voluntarily entered into was good, in the absence of fraud, mistake, etc.

Again, in *Rudd vs. Hanna*, (4 Mon., 531,) (1827), the Court said:

“As early as 1814, in the case of *Ralston vs. the Bullitts*, the plea of no consideration to an obligation was judged permissible under a statute authorizing the defendant, by special plea, to impeach or go into the consideration of such bond in the same manner as if such writing had not been sealed.”

But the Court did not decide directly that a consideration was necessary in all cases to support a writing under seal, but held the bond in dispute valid because of the existence of a consideration, the presence of which was in dispute.

But in *Clay vs. Johnson*, (6 Mon., 650-56,) (1828,) in spite of the tendency of the Court in *Boone vs. Shackelford* and *Rudd vs. Hanna* to declare the doctrine in *Ralston vs. Bullitts* to extend to all cases in which no consideration was presence, Justice Mills said:

“I cannot admit that the case of *Ralston vs. Bullitts*, although it admits the parties to go back and unravel a settlement based upon mistake, ought to be extended so far as to permit a retracing of steps where there is neither fraud or mistake.”

And therein he fully concurred in the principle enunciated in *Laily vs. Booth*, (5 Mon., 380,) (1827,) wherein it was said:

“——— pleads ignorance on the part of Booth at the time of his purchase from P. of Lailey's equity. Ignorance of any fact, bearing upon or affecting the agreement sued on, at the date of the agreement, is not pretended; no fact touching the merits and basis of that agreement has been discovered since. The defendants were as well informed of the facts before the agreement as they are now. This distinguishes the case

from that of *Ralston vs. Bullitts*. Ralston pleaded that at the execution of the bond to Bullitt, for the amount of the bill of exchange, he was ignorant that he had been discharged from his indebtedness as indorser of the bill by the negligence of Bullitt."

It will thus be seen that these two cases following *Boone vs. Shackleford* and *Rudd vs. Hanna*, restrict the application of Section 472 and declare that its construction, as far as Ralston and Bullitt applies, concerns only those cases in which an element of fraud or mistake is found to exist.

*Combs vs. Combs*, (130 Ky., 830,) (1908,) is not in point as the Court there decided that an undertaking or obligation to pay \$5,000 assumed in return for the conveyance of land (the consideration,) upon the partition of an estate could be impeached only upon a preponderant showing of fraud or mistake.

*Coyle's Executrix vs. Fowler*, (3 J. J. Mar., 472,) (1830,) does not decide the point, the question before the Court in that case being whether a plea that the note in dispute was given without good and valuable consideration was demurrable. Therein it was held that the disjunctive form was necessary, purely a matter of pleading and not touching the real issue now under discussion.

The only case that I have been able to discover in which the Court squarely held that the absence of consideration would vitiate the contract is *Snowdon vs. Leight*, (6 K. L. R., 120,) (1884). There it was said:

"Contracts to be valid must be based upon a valid consideration which at common law the plaintiff was both required to allege and prove there was but one exception to this rule, viz.: contracts which imputed a consideration, embracing sealed instruments, bills of exchange, and negotiable promissory notes. But by statute in Kentucky, all written promises are elevated to the dignity of sealed instruments and must therefore be held to purport a consideration, and the burden, etc.

"It is a well-settled rule that when the consideration has passed and become executed before the contract of the surety is made and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract.

"It was therefore competent for the defendant in the case to prove that before he signed the guarantee sued on, the

plaintiff had executed the lease and that neither his guarantee nor the promise thereof was any part of the inducement for the extension of the time for the payment of the rent. It is expressly provided that the consideration any writing "may be impeached or denied."

But the conclusion which the Court reached in this case is based upon the assumption that the seal, at common law, imported a consideration. Without such promise, the conclusion must certainly have been otherwise. I believe that it has been demonstrated that the assumption made by the Court is unwarranted. This question, however, was not raised in the argument of the case, nor has it ever, to my knowledge, been raised and judicially passed upon.

It appears, therefore, from an examination of the opinions bearing upon Section 472, that, in spite of the almost unanimous belief on the part of the bar to the effect that the statute has made the seal rebuttable evidence of consideration, there is in reality very little positive authority to be found in the decisions to support this position. With the exception of *Snowdon vs. Leight*, every case in which the statute was squarely before the Court has involved a question either of fraud or of mistake.

Moreover, it is to be observed, that not a single opinion has been taken up with a careful consideration of the wording of the statute or with a critical analysis of its general intentment. In every case, the Court has assumed, without discussion, that, whereas the legislature provided that the consideration of any writing might be impeached or denied, it thereby declared that a consideration was requisite to the validity of a specialty.

Lastly, it is submitted, that such a conclusion has arisen out of the lax manner in which the Court has viewed the significance of the seal upon a writing, holding it to import consideration, whereas the whole history of the English law is the effect that its presence alone, by reason of the solemnity attaching, is sufficient to sustain the obligation, even in the admitted absence of consideration.

On the other hand, when the statute is considered from the standpoint that the seal does not *per se* import consideration but that the formalities attending the affixing of the seal give rise to and are sufficient to support an obligation, a far different conclusion as to the effect of Section 472 is reached. It is submitted that the latter conclusion is the correct one.

Reverting, then, to Judge Chalkley's original proposition, it is submitted that Section 472 has not changed the common law

rule as to consideration in the specialty. The consideration of the sealed instrument, now, as at common law, can be impeached or denied for fraud, mistake or duress. But to show that no consideration was ever contemplated between the parties is now, as at common law, of no effect, since its existence or non-existence is immaterial to the support of the obligation, the statute not declaring consideration to be requisite.

Unsealed writings are placed on a like footing with sealed writings by the statute. (Sec. 471.) Therefore, **no writing in Kentucky requires a consideration to support it.**

JESSE I. MILLER.

NOTE—Since the above paper was completed there have been brought to my attention the lectures of Judge Jesse Bledsoe on "Contracts" as delivered before his classes at Transylvania University, where he was Professor of Law for many years prior to his death in the early thirties. A large per cent of the members of the Kentucky bar who took up the profession in the first quarter of the century, sat at his feet and the ideas there impressed upon them undoubtedly had a marked effect in shaping the present-day legal conceptions.

Judge Bledsoe presented at length in Lecture No. 5 his position as to the necessity for a consideration to sustain an obligation under seal. That this conception went a long way towards establishing a like belief on the part of his students, who subsequently became the leaders at the bar not only in this state but in many of the southern commonwealths, is undeniable and probably accounts for the mistaken attitude as regards the significance of the seal that has crept into the decisions of many of the younger states.

He says, (p. 75): "The contract is void to a certain extent when the consideration is insufficient at law. I say to a certain extent because this happened only in part to contracts evidenced by specialties, for in these the contract was considered not void, but so far valid only as to sustain the action and authorize the recovery of only nominal damages for its breach. The reason of this involves the consideration of nude pacts."

After a discussion wherein he shows the nature of both the nominate and innominate pacts of the Roman law and reaches the conclusion that such required no consideration to sustain them but that the obligation was raised by the formalities accompanying their execution alone, the learned Judge lays down this proposition:

"But our law with respect to consideration has aimed at and missed the provisions of the Roman."

"The sound principle of the common law," he continues in support of his contention, "originally before our ancestors began to be clerks was that a contract executory without a valuable consideration was not compulsory. When the common law (it is very probable that Judge Bledsoe here intended to say civil law), had intermingled itself amongst the customs of our ancestors either from the time of its establishment under Agricola or after the discovery of the Pandects at Amalfi, it seems that the introduction of deeds which took place after the Norman conquest, first principally used in grants, became afterwards a more solemn and permanent evidence of contracts, and were regarded as equal to any solemnity used by the Roman law to perpetuate and enforce them."

But with all due deference to Judge Bledsoe, it is submitted that his statement is not strictly accurate. There is no historical evidence to show that the idea of contract existed at all in the English law prior to the Norman conquest. Probably the only action akin to it was the action of debt in which, it is true, a sum certain of money must have passed to the debtor. But in the action of debt judgment was for the recovery of the specific thing loaned, i. e., a sum of money, whereas, in the action on the case a new obligation arises upon the passing of a consideration. The former savors strongly of a real action and is *ex contractu*, whereas the action of *assumpsit*, which alone gave rise to the English doctrine of consideration, is purely *delictual* in origin. The sum of money sought to be recovered in the action of debt if in no proper sense a "consideration."

Moreover, Judge Bledsoe admits that it is impossible to reconcile the existing law with his conception of the specialty. He says:

"In single obligations, it seems difficult, if not impossible, to reconcile the two rules, that you are not to aver anything against the sufficiency of the consideration and yet nominal damages alone can be recovered at law."

On the other hand there is no difficulty at all when one takes the position that no consideration is necessary to sustain the obligation in the presence of a seal.